

DOCKET FILE COPY ORIGINAL

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

2101 L Street NW • Washington, DC 20037-1526
Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: (202) 955-6631
E-Mail Address: KerstingA@dsmo.com

September 12, 2002

RECEIVED

SEP 12 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

Re: Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast Stations
(Alva, Mooreland, Tishomingo, Tuttle,
and Woodward, Oklahoma)
MM Docket No. 98-155; RM-9082; RM-9133

Dear Ms.Dortch:

Transmitted herewith on behalf of Chisholm Trail Broadcasting Co., Inc., are an original and four copies of its "Application for Review," filed in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,

DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP



Andrew S. Kersting
Counsel for
Chisholm Trail Broadcasting Co., Inc.

Enclosure

cc: Certificate of Service (w/ encl.) (by hand & first-class mail)

No. of Copies rec'd 074
List ABCDE

1177 Avenue of the Americas • 41st Floor • New York, New York 10036-2714
Tel (212) 835-1400 • Fax (212) 997-9880

www.legalinnovators.com

RECEIVED

SEP 12 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(Alva, Mooreland, Tishomingo, Tuttle,
and Woodward, Oklahoma)

MM Docket No. 98-155
RM-9082
RM-9133

To: The Commission

APPLICATION FOR REVIEW

CHISHOLM TRAIL BROADCASTING CO., INC.

Andrew S. Kersting
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, DC 20037-1526
(202) 955-6631

Its Attorneys

September 12, 2002

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction and Summary	1
II. Procedural Background.....	2
III. Questions Presented for Review	4
IV. Tyler's Reallotment Proposal Is Based on Misrepresentations to the Commission	5
V. The Commission's Policy Regarding Basic Qualification Issues In Allotment Proceedings Should Be Modified	9
VI. The <i>Second MO&O</i> Violates the Commission's Procedural Rules and Principles of Administrative Finality	13

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 12 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 98-155
Table of Allotments,) RM-9082
FM Broadcast Stations) RM-9133
(Alva, Mooreland, Tishomingo, Tuttle,)
and Woodward, Oklahoma))

To: The Commission

APPLICATION FOR REVIEW

Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail"), by counsel and pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. §1.115, hereby requests Commission review of the Assistant Chief, Audio Division's *Memorandum Opinion and Order*, DA 02-1877 (released August 2, 2002) ("*Second MO&O*") in the above-captioned proceeding. In support of this Application for Review, the following is stated:¹

I. Introduction and Summary.

This case involves an allotment proposal to change the community of license of Station KTSH(FM) from Tishomingo to Tuttle, Oklahoma. The record contains overwhelming evidence that the proponent's reallocation proposal is based on fraud. In order to avoid having its reallocation proposal constitute the removal of the sole existing service in Tishomingo, the proponent deliberately took his own station off the air and "donated" all of KTSH's technical

¹ A summary of the *Second MO&O* was published in the Federal Register on August 14, 2002. 67 Fed.Reg. 52876 (Aug. 14, 2002). Therefore, this Application for Review is timely filed.

equipment to a noncommercial station to be licensed to the same community so that it could commence program tests by the comment deadline in this proceeding. In the process of doing so, the proponent made repeated misrepresentations to the Commission about the operational status of both stations.

The Commission has a general policy of not considering basic qualification issues in allotment proceedings, preferring, instead, to consider them at the “application stage.” However, as demonstrated herein, the Commission’s policy should be revised where the allotment proceeding is not a “drop-in” proceeding involving the allotment of a new channel, and there is no opportunity to file competing applications for the new allotment. This is especially true in this case because the proponent’s misrepresentations to the Commission were critical to the success of his reallocation proposal.

The Commission also has a longstanding practice of strictly enforcing its procedural rules in allotment proceedings and adhering to well-established principles regarding administrative finality. Nevertheless, the *Second MO&O* is based solely on a subsequent change in the technical facilities of the noncommercial station that occurred more than four and one-half (4½) years after the comment deadline. The Audio Division’s decision not to enforce the Commission’s procedural rules and not to apply relevant Commission precedent has substantially prejudiced Chisholm Trail and disserved the public interest. Therefore, Chisholm Trail respectfully requests that the Commission grant this Application for Review and reverse the Audio Division’s *Second MO&O*.

II. Procedural Background.

In response to a petition for rulemaking filed by Ralph Tyler (“Tyler”), the (former) Mass Media Bureau (the “Bureau”) issued a *Notice of Proposed Rule Making* proposing to reallocate Channel 259C3 from Tishomingo to Tuttle, Oklahoma. *Notice of Proposed Rule Making*

and Orders to Show Cause, 13 FCC Rcd 25352 (MMB 1998) (“*NPRM*”). On December 22, 2000, the Bureau issued a *Report and Order*, 16 FCC Rcd 1525 (MMB 2000) (“*R&O*”), which denied Tyler’s reallocation proposal. The Bureau properly found that the city-grade contour of noncommercial educational Station KAZC(FM), Tishomingo, did not cover any portion of the Tishomingo community, and that only 23% of those people who received service from KTSH were within KAZC’s 60 dBu service contour. 16 FCC Rcd at 1533. Accordingly, the Bureau found that Station KAZC did not constitute a satisfactory replacement for KTSH at Tishomingo in accordance with *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) (“*Change of Community R&O*”), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (“*Change of Community MO&O*”). Therefore, the Bureau concluded that Tyler’s proposal to reallocate Channel 259C3 from Tishomingo to Tuttle effectively constituted a request to remove the community’s sole existing service, and, thus, triggered the same allocation priority as his proposal to bring a first local service to Tuttle. *R&O*, 16 FCC Rcd at 1533. Based on its analysis of the respective communities of Tishomingo and Tuttle, the Bureau found that Tyler failed to present a sufficiently compelling public interest benefit to warrant the removal of what, in effect, was Tishomingo’s sole local aural service. *Id.* at 1534.

On reconsideration, the Bureau affirmed its previous determination that KAZC does not constitute “an adequate substitute and that the removal of Station KTSH would be analogous to the removal of a sole local service.” *Memorandum Opinion and Order*, 16 FCC Rcd 7979, 7980 (MMB 2001) (“*Initial MO&O*”).

On May 31, 2001, Tyler filed an Application for Review of the *Initial MO&O*, reiterating the same arguments that had been presented in his reconsideration petition. Eleven months later, on April 30, 2002, and again on July 17, 2002, Tyler filed a Motion for Leave to File Supplement to Application for Review and an accompanying Supplement to Application for

Review advising the Commission of the status of KAZC's minor modification application in which the noncommercial station sought to upgrade its technical facilities from Class A to Class C2. *See* BPED-20010126ABC. On August 2, 2002, apparently in response to Tyler's submissions, the Audio Division, *sua sponte*, issued the *Second MO&O* reallocating Channel 259C3 from Tishomingo to Tuttle, Oklahoma, and modified KTSH's license to specify Tuttle as its community of license.

In the *Second MO&O*, the Audio Division stated that KAZC's upgraded facility "remove[d] the sole impediment" to "favorable action" on Tyler's reallocation proposal, and enabled the Audio Division to "resolve this proceeding on the basis of a complete record." *Second MO&O* at ¶4. In granting Tyler's reallocation proposal, the Audio Division rejected Chisholm Trail's contentions that (i) the *R&O* and *Initial MO&O* were correct at the time they were decided and should not be overturned on the basis of a subsequent change in the technical operation of another station occurring more than 4½ years after the comment deadline; and (ii) the Commission should withhold acting on Tyler's reallocation proposal because his proposal is based on fraud. The Audio Division specifically stated that "[t]he allegations regarding Ralph Tyler and Station KAZC are outside the scope of this reallocation proceeding" *Id.*

III. Questions Presented for Review.

The following questions are presented for review:

1. Whether the Commission's policy of not considering basic qualification issues in allocation proceedings should be revised where the proponent does not seek the allocation of a new channel that will be subject to competing applications, but, instead, requests to change an existing station's community of license;
2. Whether the Audio Division erred in issuing the *Second MO&O*, *sua sponte*, where there was no factual or legal error in the *Initial MO&O*, and the sole basis for the *Second MO&O* was a subsequent change in the operation of another radio station that occurred over 4½ years after the comment deadline in this proceeding and was entirely within the rulemaking proponent's control; and

3. Whether the Audio Division's issuance of the *Second MO&O* is inconsistent with the Commission's procedural rules and conflicts with well-established principles of administrative finality.

As demonstrated herein, the Commission's policy of not considering basic qualifying issues in the allotment context should be modified where, as here, the proposal does not request the allotment of a new channel, but, instead, requests to change the community of license of an existing station. This is especially true in this case because Tyler's misrepresentations to the Commission go to the heart of his reallocation proposal. Moreover, the Audio Division's issuance of the *Second MO&O* conflicts with Commission precedent dictating that its procedural rules are to be strictly enforced in allotment proceedings and well-established principles concerning administrative finality.

IV. Tyler's Reallocation Proposal Is Based on Misrepresentations to the Commission.

Tyler intended to move KTSH into the Oklahoma City market since he first acquired the construction permit from South Central Oklahoma Christian Broadcasting, Inc. ("South Central") in May 1996. *See* BAPH-19960111B6. Although South Central was unable to put KTSH on the air,² Tyler promptly constructed KTSH and filed a license application on August 20, 1996 (BLH-19960820KA). On February 20, 1997, while the KTSH license application was still pending, Tyler filed a construction permit application purportedly to move the station's transmitter to a site northwest of the community in the direction of Tuttle. *See* BPH-19970220IA. However, Tyler never intended to construct KTSH's modified facility.³ The

² South Central acquired a construction permit for KTSH in September 1994. After filing an application to replace an expired permit for the station on September 21, 1994 (BPH-19940921JE), South Central later filed three applications to extend the KTSH permit (*see* BPH-19950216JA, BMPH-19951107JA, and BMPH-19960218IC), but was unable to put the station on the air.

³ Tyler's initial construction permit application for KTSH was granted on August 26, 1997 (BPH-19970220IA). However, on December 10, 1998, Tyler told the property owner of his proposed transmitter site that he did not have FCC approval to build a tower on the property. *See* (footnote continued on next page)

KTSH construction permit site was located in a remote area near a rock quarry, which is not easily accessible. Tyler filed his construction permit application for the sole purpose of supporting his soon-to-be-filed rulemaking petition because the proposed transmitter site on the Hallmarks' property created the requisite mutual exclusivity between KTSH and the reference coordinates for Tyler's proposed allotment of Channel 259C3 to Tuttle.⁴ Tyler filed his rulemaking petition approximately one month later, on March 21, 1997. In his petition, Tyler claimed, *inter alia*, that his proposal complied with Section 1.420(i) of the Commission's rules because the proposed allotment was short-spaced to the transmitter site specified in his then-pending construction permit application.⁵ See Tyler Petition for Rulemaking, pp. 2-3.

Tyler's plan to move KTSH to Tuttle eventually unraveled. The Commission's August 28, 1998, *NPRM* directed Tyler to "provide further information demonstrating why the public interest would be served" by removing Tishomingo's sole local broadcast service merely to provide a first local service at Tuttle. *NPRM*, 13 FCC Rcd at 25356. Tyler realized that he could not make a satisfactory showing in this regard because his proposal would deprive Tishomingo – the county seat of Johnston County, Oklahoma – of its sole local broadcast service. At the same time, it would merely provide the already well-served community of Tuttle

Declaration of Ron Hallmark and Finis Hallmark, dated December 19, 1998, attached hereto as Attachment A. The Hallmarks' declaration was submitted to the Commission in support of Chisholm Trail's "Opposition to Motion to Accept Response and Response of Ralph Tyler," filed December 23, 1998.

⁴ Tyler never implemented the KTSH construction permit (BPH-19970220IA). Less than two months before the permit expired, Tyler filed another construction permit application (BPH-20001218ADB) in order to maintain the requisite mutual exclusivity between KTSH and his proposed allotment reference coordinates at Tuttle. Although Tyler's second construction permit application was granted on April 10, 2001, Tyler again has made no effort to construct KTSH's modified facility.

⁵ This proceeding is not the first time that Tyler has attempted to move a station from a rural community to an Oklahoma City suburb. See, e.g., *Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (MMB 1996), in which Tyler was successful in moving Station KKNB (formerly KTLS) from Ada to Newcastle, which is approximately 15 miles east of Tuttle.

with a 27th radio service.⁶ Tyler therefore determined that he had no choice but to hasten the commencement of KAZC's on-air operation. In a desperate attempt to effectuate his goal of moving KTSH to the Oklahoma City area, Tyler took his own station, KTSH, off the air for the sole purpose of permitting KAZC to commence on-air operations.

By letter dated October 1, 1998, Tyler represented to the Commission that KTSH had "temporarily suspended" operations on September 28, 1998, "due to antenna failure."⁷ By letter dated September 29, 1998, South Central notified the FCC that KAZC had commenced program tests and that a license application would be filed "within the next 10 days."⁸ Thus, as of the October 19, 1998, comment deadline in this proceeding, Tyler led the Commission to believe that KTSH had suffered "antenna failure" on September 28, 1998, and that, on the following day, KAZC commenced program tests from the same tower, and at the same location on the tower where KTSH's transmission line previously had been plugged into KTSH's end-fed, Jampro 6-bay antenna.⁹

Attached hereto as Attachment C is a copy of an engineering statement by William H. Nolan, which was filed in support of Chisholm Trail's November 3, 1998, Reply Comments ("Reply Comments").¹⁰ Despite Tyler's representation to the Commission that KTSH suffered

⁶ See Chisholm Trail's "Response to Order to Show Cause," filed October 19, 1998, at 10-12.

⁷ A copy of Tyler's October 1, 1998, letter is attached hereto as Attachment B.

⁸ See Comments of Ralph Tyler ("Tyler Comments"), Attachment.

⁹ Tyler's Comments included as an attachment a copy of the KAZC license application which was filed on October 2, 1998. See BPED-19981002KA ("KAZC License Application"). As discussed in Chisholm Trail's Reply Comments, the engineering portion of that application was prepared by Tyler's station engineer, Randall Mullinax, and contained numerous factual inaccuracies.

¹⁰ Chisholm Trail's Reply Comments contain a comprehensive analysis of the relevant facts concerning Tyler's decision to take KTSH off the air so that KAZC could commence program tests prior to the comment deadline in this proceeding. See Chisholm Trail Reply Comments at 2-17.

“antenna failure,” Mr. Nolan’s attached statement as well subsequent declarations by Tyler and Randall Mullinax¹¹ make clear that Tyler unplugged the KTSH transmission line from the KTSH antenna and plugged the same transmission line into KAZC’s single-bay antenna. *See* Attachment C, at 6 and Ex. 4 thereto.¹² *See also* KAZC License Application.

Mr. Nolan’s inspection of the KTSH/KAZC transmitter/studio site also revealed that there was only one transmitter and one transmission line at the KTSH tower site. A Collins 830 transmitter had served as KTSH’s transmitter from the time KTSH commenced operation in August 1996 until Tyler had his engineer re-tune the KTSH transmitter to operate on KAZC’s noncommercial frequency so that KAZC could commence on-air operation prior to the comment deadline. *See* Attachment C, at 6; Attachment D, Mullinax Declaration at 1. Thus, although Tyler told the Commission that KTSH had suffered antenna failure, the undisputed facts are that (i) there was no problem whatsoever with KTSH’s antenna, and (ii) KTSH could not have returned to on-air operation without the installation of an additional transmitter and transmission line.¹³ *See* Attachment C at 6. After the above facts were brought to the Commission’s attention through the filing of Chisholm Trail’s Reply Comments on November 3, 1998, Tyler admitted the following in his December 11, 1998, declaration:

¹¹ The declarations of Tyler and Randall Mullinax, dated December 11 and December 10, 1998, respectively, are attached hereto as Attachment D. Tyler filed those declarations with the Commission on December 14, 1998, approximately six weeks after Chisholm Trail brought Tyler’s misrepresentations to the Commission’s attention through the filing of its November 3, 1998, Reply Comments.

¹² Exhibit 4 to Mr. Nolan’s statement clearly shows that the lowest bay of the KTSH antenna had to be removed from the tower in order to make room for the KAZC single-bay antenna. *See* Attachment C, Ex. 4.

¹³ In his December 10, 1998 declaration, Mullinax admitted that he not only lied to an FCC field inspector concerning the operation of KTSH and KAZC, but he went so far as to telephone the tower crew and an electronics dealer and asked them to verify his false account to the field inspector in the event the inspector called them. *See* Attachment D, Mullinax Declaration at 1.

There was an FCC rule making comment deadline approaching on October 19, 1998, and I felt the best way to answer certain questions posed by the FCC in the rule making proceeding was to *assist noncommercial educational station KAZC to get on the air by donating the KTSH transmitter, transmission line, and studio equipment and the engineering services necessary to complete the KAZC installation*. It had always been my intent to donate this equipment to KAZC, but because of the FCC deadline I decided to do it sooner than I had planned.

Attachment D, Tyler Declaration at 1 (emphasis added).

As demonstrated above, Tyler was acutely aware that his rulemaking proposal to move KTSH to the Oklahoma City area was dependent upon the existence of another radio station in Tishomingo so that his reallocation proposal would not deprive Tishomingo of its only local broadcast service. The facts outlined above concerning KTSH and KAZC establish that Tyler has been the impetus behind KAZC from the outset, and that the very existence of KAZC has been merely a pawn in Tyler's scheme to move KTSH to Tuttle. The record could not be more clear that Tyler attempted to deceive the Commission in an effort to obtain a grant of his reallocation proposal.

V. The Commission's Policy Regarding Basic Qualification Issues In Allotment Proceedings Should Be Modified.

The Commission's policy of not considering basic qualification issues in the allotment process was established in rulemaking proceedings involving the allotment of a new channel. In *Crandon, Wisconsin*, 3 FCC Rcd 6765 (1988), Commission articulated its rationale for refusing to address basic qualification issues in the allotment context. In that case, the Commission directed an existing television station to show cause why its license should not be modified to specify a new channel offset which would enable the Commission to allot a new television station to Crandon, Wisconsin as its first local television service. In responding to an objection by the existing station, the Commission stated that an allotment proceeding is not an appropriate forum to consider the financial ability of the rulemaking proponent to satisfy the

requirement of reimbursing the existing station for modifying its channel offset. The Commission noted that it was premature to assume at the allotment stage that the rulemaking proponent would ultimately become the permittee of the new Crandon station. The Commission therefore stated that considering a party's financial qualifications at the application stage "is more conducive to the efficient transaction of Commission business." *Id.* at 6765. The Commission also noted that, in the event the existing station wished to raise any issues concerning the financial qualifications of a particular applicant for the new Crandon station, it could do so at the application stage. *Id.*

The same rationale was expressed in *Goodland, Kansas*, 1986 FCC Lexis 3766 (Pol. & Rul. Div. 1986). In that case, the Policy and Rules Division stated that the Commission generally does not consider basic qualification issues at the rulemaking stage because the question as to which party will ultimately become the successful applicant for the proposed new station is a matter of "mere speculation." "The qualifications of a prospective licensee are, therefore, inappropriate in a rule making proceeding and are more properly raised at the application stage." *Id.* Similarly, in *Pleasant Dale, Nebraska*, 14 FCC Rcd 18893 (MMB 1999), the Bureau stated that the public interest would not be served by requiring the petitioner to demonstrate its financial ability to construct and operate a station at the rule making stage because, *inter alia*, the allotment of the new FM channel would be the subject of a filing window in which other interested parties may submit competing applications. Therefore, there was no guarantee that the petitioner would be the ultimate permittee.¹⁴ *Id.* at 18894-95.

¹⁴ See also *Lexington, Michigan*, 4 FCC Rcd 2639 (MMB 1989) (although allegations presented by petitioner were of concern to the Commission, the Allocations Branch stated that the "qualifications of an applicant are more appropriately considered at the application stage, rather than the rule making stage"); *Vancouver, Washington; Coos Bay and Corvallis, Oregon*, 4 FCC Rcd 839 (Pol. & Rul. Div. 1988) (financial qualifications of a prospective applicant are matters for consideration outside the scope of a rule making proceeding).

(footnote continued on next page)

As reflected above, the Commission's general policy of not considering basic qualification issues in the allotment context is based on the assumption that the newly allotted channel will be subject to a filing window and, thus, competing applications. In that context, there is no assurance that the rulemaking proponent will become the permittee of the new station. In the event that the rulemaking proponent is ultimately selected as the high bidder in an auction proceeding (or, formerly, the prevailing applicant in a comparative hearing proceeding), the Commission has the opportunity to address any allegations concerning the basic qualifications of the proponent through the filing of a petition to deny at the application stage. Therefore, it is more efficient in the Commission's administrative processes to consider basic qualification issues at the application stage, rather than the allotment stage. Because the Commission's policy with respect to considering basic qualifying issues in allotment proceedings arose in the context of drop-in proceedings, the Commission's analysis is properly limited to technical and demographic concerns such as whether the proposed allotment complies with the Commission's minimum distance separation requirements, would provide the requisite city-grade coverage to the proposed community of license, and would result in a preferential arrangement of allotments under the Commission's traditional FM allotment criteria. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

The Commission's rationale for refusing to consider basic qualification issues in the allotment context – or, more accurately, drop-in proceedings – does not apply to reallocation

Since the Commission adopted its policy of refusing to consider basic qualification issues in the allotment context, there has been an increasing blurring of the line between the "allotment" and "application" stages. The Commission now permits certain co- and adjacent-channel changes to be made to the Table of Allotments through the application process alone. *See Amendment of the Commission's Rules To Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993). In the "one-step" proposal context, no petition for rulemaking is ever filed. Although the Commission therefore considers basic qualification issues in the "application context," those issues are addressed *before* any change is made in the Table of Allotments.

proposals seeking to change an existing station's community of license. Unlike a request to allot a new channel, a proposal to reallocate an existing station from one community to another is not subject to competing applications. The only party that is permitted to file an application following the grant of such a reallocation proposal is the proponent itself. Thus, the only opportunity to present allegations challenging the proponent's basic qualifications at the "application stage" is through the filing of an informal objection to the proponent's minor change application. However, the proponent's minor change application is not filed until *after* the change in the FM Table of Allotments has become effective and the station's license has been modified to specify the new community. This is not a satisfactory means of addressing qualifying issues because the rulemaking proponent will have already achieved its desired goal of amending the Table of Allotments and moving its station to the new community. Thus, if the reallocation is accomplished by deceiving the Commission or otherwise through a means that disservices the public interest, addressing basic qualification issues at the "application stage" is completely unavailing because the reallocation will have already become final.

This result would be especially egregious in this case. As demonstrated above, Tyler's misrepresentations to the Commission regarding the operation of KTSH and KAZC go to the very heart of his reallocation proposal. But for Tyler's willingness to deceive the Commission, his reallocation proposal could not have been granted. The Commission should not ignore Tyler's misrepresentations under the guise that this proceeding is at the "allotment stage" because, as demonstrated above, the rationale underlying the Commission's policy does not apply to Tyler's reallocation proposal. If the Commission were to apply its general policy in this case, it would effectively reward Tyler for the fraud that he has attempted to perpetrate on the Commission. Indeed, not one of the cases in which the Commission has applied its policy regarding its unwillingness to consider basic qualification issues in the allotment context involves a reallocation proposal where (i) there is no opportunity to file competing applications

for the new allotment, and (ii) the proposal is based on fraud. Therefore, the Commission's general policy of not considering basic qualification issues in the allotment context should be revised so that it is not applied in proceedings involving a proposal to change a station's community of license, especially where, as here, the proponent made material misrepresentations to the Commission which are critical to the success of its reallocation proposal.

VI. The *Second MO&O* Violates the Commission's Procedural Rules and Principles of Administrative Finality.

In an effort to support its decision to consider KAZC's upgraded facility as constituting a satisfactory replacement service at Tishomingo, the Audio Division cites *Com/Nav Marine, Inc.*, 2 FCC Rcd 2144 (Priv. Rad. Bur. 1987), and *Central Florida Enterprises, Inc.*, 598 F.2d 37 (D.C. Cir. 1978). However, those cases are distinguishable on their facts and do not support the Audio Division's decision. Unlike the *R&O* and *Initial MO&O*, which were correctly decided, the initial decisions in *Com/Nav Marine* and *Central Florida* contained errors and were not based on a subsequent change of facts which occurred more than 4½ years after a procedural deadline.

In *Com/Nav Marine*, the Private Radio Bureau ("PRB") dismissed an application for a new public coast station at Mobile, Alabama. In granting reconsideration of that dismissal, the PRB agreed with the applicant that the 70% coverage-overlap test it had used in summarily dismissing the application had not been adequately published by rule or public notice. 2 FCC Rcd at 2144. Thus, the effect of the PRB's reconsideration order in *Com/Nav Marine* was to correct an error in its initial decision. *Id.* at 2145. The reconsideration order was not based on a subsequent change in facts long after a procedural deadline.

In *Central Florida*, the U.S. Court of Appeals for the District of Columbia Circuit stated that, although an appeal from a Commission order had been filed with the court, the appeal

did not preclude reconsideration by the Commission where the 30-day reconsideration period had been tolled by the filing of a reconsideration petition by another party. However, *Central Florida* does not support the Audio Division's action. In *Central Florida*, the Commission reconsidered its earlier decision *sua sponte* because it found it had erred in its analysis of the incumbent licensee's renewal preference. 598 F.2d at 48. Unlike the *Second MO&O*, the Commission's reconsideration order was not based on a subsequent change of events that transpired years after a procedural cut-off date. Therefore, although the filing of Tyler's application for review tolled the 30-day reconsideration period, that fact alone does not support the Audio Division's reconsideration of the *Initial MO&O* which was correctly decided.

The Audio Division's issuance of the *Second MO&O* – which was based solely on a subsequent change in facts that occurred more than 4½ years after the comment deadline in this proceeding – violates fundamental principles of administrative finality. It is well established that the Commission has the authority to adopt procedural cut-off rules in order to promote the goals of administrative orderliness and finality. See *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd 4743, 4744-45 (1993), citing *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327, 333 n.9 (1945). Without these rules, it would be difficult for the Commission to process and grant applications and rulemaking petitions. 8 FCC Rcd at 4744-45. Commission precedent dictates that the Commission's procedural rules in allotment rulemaking proceedings are to be strictly enforced. *Lafayette, Louisiana*, 3 FCC Rcd 4614, 4618 (Pol. & Rul. Div. 1988), citing, *inter alia*, *Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, 2 FCC Rcd 1290 (1987). The U.S. Court of Appeals for the 2nd Circuit has held that the Commission's adherence to its rules and regulations is necessary to preserve “the orderliness and predictability which are the hallmarks of lawful administrative action.” See *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (2d Cir. 1986).

In *Caldwell, College Station and Gause, Texas*, 15 FCC Rcd 20641 (2000)

(“*Caldwell*”), a reconsideration petition requested the full Commission to consider a change in the technical facilities of another radio station. Specifically, the petitioner noted that another radio station had downgraded its facilities which enabled the petitioner to file a one-step application to increase its facilities from Class A to Class C2. The Commission found that if the petitioner’s station were to operate as a Class C2 facility from the proposed transmitter site, it would, for the first time, comply with Section 73.315(a) of the rules by providing the requisite city-grade signal over the proposed community of license. 15 FCC Rcd at 20642.

In rejecting the petitioner’s attempt to enhance its allotment proposal after the comment deadline, the Commission stated as follows:

We will not consider the grant of [the other station’s] downgrade application or the subsequent application [of the petitioner] in the context of this proceeding. This is because at the time [the petitioner] filed his upgrade proposal and throughout this proceeding, his proposal has not complied with Section 73.315(a) of the Rules.

15 FCC Rcd at 20642. The Commission articulated the fundamental principle that petitions for rulemaking and counterproposals must be technically correct at the time they are filed. *Id.* at 20642, citing *Broken Arrow and Bixby, Oklahoma; Coffeyville, Kansas*, 3 FCC Rcd 6507 (MMB 1988). The Commission also stated that “[w]e . . . will not permit a rulemaking proponent to perfect its proposal after the comment date to the prejudice of another party in the rulemaking proceeding.” *Id.* at 20642-43 (emphasis added). Although the Commission had considered technical information submitted by the petitioner after the comment date, the Commission specifically noted that consideration of that late-filed information did not prejudice the prevailing party. *Id.* at n.4.

The comment deadline in this allotment proceeding was October 19, 1998. The Bureau properly found that, as of the comment deadline, KAZC did not constitute an adequate replacement service for KTSH in Tishomingo. *R&O*, 16 FCC Rcd at 1533; *Initial MO&O*, 16

FCC Rcd at 7980. Station KAZC was not granted a construction permit to operate with Class C2 facilities until February 15, 2002. South Central did not implement the construction permit and file a license application for KAZC's Class C2 facility until April 30, 2002. The KAZC license application was not granted until July 10, 2002. *See Public Notice*, Report No. 45276 (released July 15, 2002). Thus, although Tyler has provided all of the finances, technical equipment, and engineering services for KAZC since even before it commenced operation in September 1998, KAZC did not constitute a replacement service for KTSH until more than 4½ years after the comment deadline in this proceeding. Like the petitioner's station in *Caldwell*, as of the comment deadline and throughout this proceeding, Tyler's proposal did not comply with Section 1.420(i) of the rules because KAZC did not constitute an adequate replacement service at Tishomingo. Moreover, as demonstrated by Tyler's misrepresentations to the Commission, Tyler was fully aware of this fact at the time he filed comments in this proceeding. Therefore, in accordance with the full Commission's decision in *Caldwell*, the Audio Division erred in considering KAZC's upgraded operation because it resulted in substantial prejudice to Chisholm Trail. *Caldwell*, 15 FCC Rcd at 20642-43 n.4.

The Audio Division did not cite any precedent to permit Tyler to "perfect" his reallocation proposal more than 4½ years after the comment deadline in this proceeding. The *Second MO&O* contains only the conclusory statements that (1) KAZC's upgraded operation "removes the sole impediment" to "favorable action" on Tyler's reallocation proposal, and (2) Tyler could "immediately file" a rulemaking petition "proposing the same reallocation to Tuttle." *Second MO&O* at ¶4. The Audio Division's conclusory statements are woefully inadequate to support its failure to adhere to the procedural deadlines that apply in allocation rulemaking proceedings and apply the standard set forth by the full Commission in *Caldwell*.

Moreover, as the Commission is well aware, FM broadcasting is not a static environment. Stations routinely seek to modify their existing authorizations for a variety of

reasons by proposing changes in their operation such as upgrading their technical facilities (*e.g.*, KAZC), moving to a new transmitter site, and/or downgrading their facilities. If the Audio Division's decision were to be upheld, it raises the obvious question of what result would ensue if, during the pendency of this Application for Review or a subsequent judicial appeal, KAZC were to modify its technical facilities such that it would provide 60 dBu service to only 50% of the Tishomingo community.¹⁵ If KAZC were to modify its facilities in this manner, the Commission would then need to determine whether, in light of the subsequent modification to KAZC's facility, it still constitutes an adequate replacement service at Tishomingo. The Commission's determination would, of course, have to be revisited again if there were any further modifications to KAZC's technical facilities prior to a final decision in this proceeding. This is just one example of how the Audio Division's failure to adhere to the Commission's procedural rules and apply the standard set forth in *Caldwell* would lead the Commission down a dangerous path because it would inject a great deal of uncertainty into the Commission's allotment process and effectively erode administrative orderliness and finality. There must be a point in allotment proceedings at which the record is frozen and parties are not permitted to submit additional information in an effort to perfect their allotment proposal.¹⁶ The well-established cut-off date is the comment deadline. *See Caldwell*, 15 FCC Rcd at 20642. The Audio Division's failure to follow Commission precedent and freeze the record in this

¹⁵ *See* 47 C.F.R. §73.515 (requiring noncommercial FM stations to provide 60 dBu service to either 50% of their community of license or 50% of the population within the community). As stated above, the Bureau denied Tyler's reallocation proposal because KAZC's city-grade contour initially did not cover any portion of Tishomingo, and only 23% of those people who received service from KTSH were within KAZC's 60 dBu service contour. *R&O*, 16 FCC Rcd at 1533.

¹⁶ *See, e.g., Grove City, Pennsylvania and Hubbard, Ohio*, 6 FCC Rcd 7114, 7115 (Pol. & Rul. Div. 1991) (In affirming the dismissal of a counterproposal filed after the comment deadline, the Policy and Rules Division stated that Section 1.420(d) of the rules is a "fundamental procedural cornerstone for the freezing of the record in allotment proceedings and is critical to the administration of the allotment rulemaking process").

proceeding as of the comment deadline would frustrate the Commission's administrative processes.

Furthermore, KAZC's upgraded facilities reflect an impermissible attempt on the part of Tyler to enhance his reallocation proposal long after the comment deadline. Tyler had every opportunity at the comment stage of this proceeding to propose a replacement service at Tishomingo to support his reallocation proposal. Instead, Tyler made the voluntary decision to take KTSH off the air, "donate" the station's transmission and studio equipment to KAZC so the noncommercial station could commence operation by the comment deadline in this proceeding, and make a series of material misrepresentations to the Commission. After the Bureau issued the *R&O* denying his reallocation proposal, Tyler attempted to enhance his proposal years after the comment deadline by asking the Commission to refrain from acting on his reallocation proposal until after the KAZC modification application – which he engineered – was granted and he could implement the Class C2 upgrade.¹⁷ Tyler's effort to enhance his reallocation proposal by upgrading KAZC's technical facilities years after the comment deadline should not be permitted. *See Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (a party may not "sit back and hope that a decision will be in its favor, and then, when it isn't, parry with an offer of more evidence. No judging process in any Bureau of government could operate efficiently or accurately if such a procedure were allowed" (footnote omitted)).

The Audio Division also erred in its determination that the fact Tyler could re-file his reallocation proposal today suggests that he should not be required to do so. *See Second MO&O* at ¶4. The mere fact that Tyler could re-file his reallocation proposal does not mean that it would

¹⁷ *See* Tyler's "Application for Review," filed May 31, 2001 at 8-9. Tyler's handling of all engineering matters for KAZC and the circumstances surrounding the filing of KAZC's modification application provide further evidence that Tyler is the real-party-in-interest in KAZC and that he continues to have complete control over the station. *See, e.g.,* Chisholm Trail's "Opposition to Application for Review," filed June 15, 2001, at 15-16.

not be subject to competing allotment proposals, or that the Commission necessarily would find that it would prevail over competing proposals and best serve the public interest. The FM Table of Allotments is fluid in nature due to the constant flow of rulemaking and one-step allotment proposals that are filed with the Commission. The Audio Division apparently assumed that the allotment possibilities that exist today are no different from those that existed in October 1998. That simply is not the case. The potential counterproposals that could be filed in response to Tyler's reallocation proposal (or as a petition for rulemaking if Tyler's proposal were dismissed) are different from the allotment possibilities that existed in October 1998. Thus, although it undoubtedly would serve Tyler's interest and perhaps result in some degree of administrative convenience to resolve this proceeding without requiring Tyler to re-file his reallocation proposal, it would not serve the public interest. Therefore, for this additional reason, the Audio Division erred in not enforcing the Commission's procedural rules and requiring Tyler to have perfected his reallocation proposal by the comment deadline.

Conclusion

As demonstrated herein, the Commission's policy of not considering basic qualification issues at the "allotment stage" should be revised where the allotment proceeding does not involve the allotment of a new channel and there is no opportunity to file competing applications for the new channel. This is especially true where, as here, the rulemaking proponent made material misrepresentations to the Commission that go to the very heart of his reallocation proposal. Therefore, because the Audio Division essentially ignored the overwhelming evidence in the record which establishes that Tyler's reallocation proposal is based on fraud, the *Second MO&O* should be reversed.

The *Second MO&O* also should be reversed because (i) the Audio Division did not apply Commission precedent dictating that the Commission's procedural rules are to be strictly

enforced in allotment proceedings, and (ii) it failed to adhere to well-established principles of administrative finality. Because the record establishes that Tyler has been the impetus behind KAZC's very existence, the *Second MO&O* effectively permitted Tyler to perfect his deficient reallocation proposal 4½ years after the comment deadline.

WHEREFORE, in light of the foregoing, Chisholm Trail Broadcasting Co., Inc. respectfully requests that this Application for Review be GRANTED, that the *Memorandum Opinion and Order*, DA 02-1877 (released August 2, 2002), be REVERSED, and that the proposal to reallocate Channel 259C3 from Tishomingo to Tuttle, Oklahoma be DENIED.

Respectfully submitted,

Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, DC 20037-1526
(202) 785-9700

Attorneys for

CHISHOLM TRAIL
BROADCASTING CO., INC.

By: 
Andrew S. Kersting

September 12, 2002

ATTACHMENT A

Declaration of Finis and Ron Hallmark

DECLARATION OF FINIS HALLMARK AND RON HALLMARK

1. We, Finis Hallmark and Ron Hallmark hereby declare and state, under penalty of perjury, the following;
2. Ron Hallmark is the owner of certain property located in Johnston County, Oklahoma that was specified as the proposed transmitter site in an FCC construction permit application (File No. BMPH-970220IA), filed by Ralph Tyler, licensee of Station KTSH (FM), Tishomingo, Oklahoma
3. Finis and Ron Hallmark have not been contacted by Mr. Tyler or his representatives since signing the letter which allowed the use of Ron's property as a tower site for the KTSH (FM) construction permit application on February 11, 1997.
4. On or about December 10, 1998, Finis Hallmark, the father of Ron Hallmark, placed a telephone call to Mr. Tyler to ask him whether he still intended to construct a tower on Ron Hallmark's property. Mr. Tyler told Finis Hallmark that he was having trouble with the FCC, and that he would not have FCC approval to build a tower on Ron Hallmark's property until March or April, 1999.
5. Finis and Ron Hallmark have since been advised that the FCC granted Mr. Tyler's construction permit application (File No. BMPH-970220IA), and that he was issued a construction permit for KTSH's modified facility on August 26, 1997.
6. Finis Hallmark believes that Mr. Tyler was not candid with him in their telephone conversation on or about December 10, 1998, because Mr. Tyler has had approval to construct a new tower on Ron Hallmark's property since August 26, 1997.

Signed and dated this 19 day of December, 1998


Ron Hallmark


Finis Hallmark

ATTACHMENT B

**Letter Dated October 1, 1998 From
Ralph H. Tyler to Magalie Roman Salas, Esquire**

532N
C b q

RECEIVED
OCT 8 1998
FCC MAIL ROOM

Ralph H. Tyler

100 S. Shields Blvd. Oklahoma City, Oklahoma 73129 (405) 616-5500

October 1, 1998

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: KTSH (FM) Tishomingo, Oklahoma

Dear Ms. Salas:

This letter is to inform the Federal Communications Commission that due to antenna failure on September 28, 1998, the operation of KTSH (FM) has been temporarily suspended.

If there are any questions concerning our suspended operation, please contact me at (405) 616-5500 or by mail at the above address.

Sincerely,

Ralph H. Tyler

Ralph H. Tyler
President

cc: KTSH Public File
Gary Smithwick

ATTACHMENT C

Engineering Statement of William H. Nolan

Nolan Broadcast Services

KTSH/KAZC Tower Site Inspection Tishomingo, Oklahoma

Prepared for:

Chisholm Trail Broadcasting Company

November, 1998

Nolan Broadcast Services

Certification of Engineer

I, William H. Nolan, with offices at 1664 Melrose Lane, Wichita, KS, have been retained for the purpose of preparing the technical data forming this report.

My work is a matter of record before the Federal Communications Commission. I have filed numerous applications that have been subsequently granted by the Commission. I have spent 18 years in the broadcast industry, and have designed and constructed numerous radio stations in that time, including AM and FM facilities.

I declare under penalty of perjury that the contents of this report are true and accurate to the best of my knowledge and belief.

Signed: 

Date: 11/2/98

William H. Nolan
Broadcast Technical Consultant
(316) 655-0655

Nolan Broadcast Services

Engineering Statement

I, William H. Nolan, have been retained by Chisholm Trail Broadcasting Co. to inspect the tower facilities of radio stations KTSH (FM) and KAZC (CP) to determine antenna orientation and operating status.

Background

KTSH (FM) and KAZC (CP) currently operate from a common tower located at a North Latitude of 34° 21' 23", and a West Longitude of 96° 33' 34".¹

KTSH (FM) operates at a HAAT of 100 meters, with a height above ground level on the supporting structure of 77 meters. KTSH (FM) operates on Channel 259C3.

KAZC (CP) filed an FCC Form 302-FM Application for FM Broadcast Station License on October 2, 1998, specifying a HAAT of 100 meters, with a height above ground level on the supporting structure of 77 meters.² This application specified no beam tilt. KAZC operates on Channel 202A, under program test authority.

October 24, 1998 Site Inspection

I visited the tower site for KTSH and KAZC on Saturday, October 24, 1998, at 2:00pm CST. The gate at the highway was locked, and access to the main studio was restricted. I attempted to monitor both stations with an IFR Com 120-B spectrum analyzer to determine operating frequencies and modulation parameters. I confirmed that this was the correct tower site by photographing the FCC Tower Registration identification sign located at the main gate. (See Exhibits #1, 2, and 3)

Licensed station KTSH (FM) was not on the air. The spectrum analyzer confirmed no carrier at 99.7 MHz. Thus, it was not possible to ascertain whether or not KTSH was operating within Commission rules regarding frequency and modulation.

Station KAZC (CP) was on the air, and program material consisted of Contemporary Christian music. I noted several instances in which the call letters "KAZC" were announced on the air. The operating frequency and modulation parameters were found to be within compliance of Commission rules.

¹ FCC Tower Registration ID #1011425

² FCC File No. BLED-981002KA

Nolan Broadcast Services

An inspection of the KTSH (FM) antenna on the supporting structure revealed an end-fed Jampro 6-bay antenna, located at 77 meters AGL. However, the lowest bay of the antenna was removed from the supporting structure. The open innerbay line, and the empty mounting bracket for the missing bay were clearly visible. (See Exhibit #4)

An inspection of the KAZC (CP) antenna on the supporting structure revealed a Jampro 1-bay antenna, with no tuning section, located at 68 meters AGL. This antenna was clearly below the lowest bay of the KTSH Jampro antenna. The antenna height AGL was further confirmed by counting tower sections. It was also noted that the KAZC (CP) antenna was incorrectly mounted, resulting in approximately 3 degrees of positive beam tilt. (See Exhibit #3)

October 30, 1998 Site Inspection

I revisited the site on Friday, October 30, 1998 at 12:15pm CDT. The gate at the highway was again locked, and access to the main studio was restricted. I called directory assistance in an effort to obtain a phone number for the main studio of KTSH, or KAZC. There was no listing for either radio station in Tishomingo, Oklahoma. I asked the operator to check any small town within the area to determine if she could locate any phone listing for either station. The operator was able to provide a phone number listed for KTSH in Connerville, Oklahoma.

I called the number provided and asked to see the Public Inspection File for radio station KTSH. After several questions regarding who I was, and whom I represented, I was told that I would be met at the gate for access.

The operator on duty was Ms. Tina Smith. She produced the public file for KTSH, and I proceeded to review its contents. There was no copying machine available in the main studio, so it became necessary for me to photograph any documents that I desired to copy.

I asked Ms. Smith why KTSH was off the air, and she informed me that there was an "antenna failure." I then asked Ms. Smith if she knew when the station would be back on the air. She produced two letters from the public file. The first letter, addressed to the Commission, indicated that KTSH was off the air due to an antenna failure. The second letter, dated October 27, 1998, and addressed to the Commission, requested an additional 90 days of silence "pending the installation of new equipment."

I then asked Ms. Smith to see the public inspection file for station KAZC, and I proceeded to review its contents.

Nolan Broadcast Services

I then asked Ms. Smith if the studio we were in was the KTSH studio, or the KAZC studio. She informed me that there was only one studio for both radio stations. I asked Ms. Smith if the program content for stations KTSH and KAZC were the same. She informed me that the only music service available was a Christian format provided by Jones Satellite Music. Ms. Smith also informed me that she was the only operator for stations KTSH and KAZC, and that she normally worked five days a week at the studio. (See Exhibit #5)

I asked Ms. Smith if she was aware of any work that was underway to repair the KTSH antenna. She informed me that she was not aware of any work being done on the antenna, and offered to show me the bay that had been removed from the tower. I accepted her offer, and she led me to a ladder that provided access to a storage area above the ceiling of the studio room.

I inspected the single bay of the KTSH Jampro antenna, which was stored above the main studio room. This bay was in an upright position, with the mounting bracket still attached. Two sections of inner bay line were still attached to the bay. One section was attached to the top of the bay, and one section was attached to the bottom of the bay. The inner bay line attached to the top of the antenna bay had a cover bolted in place to prevent contamination from dust or moisture. Bolts were visible on the bottom section of inner bay line as well, indicating that it had also been covered to prevent contamination. A visual inspection of the entire antenna assembly revealed no physical damage of any kind. No abnormal discoloration was apparent to indicate any burning or super heating of the antenna bay. Normal tarnishing of the antenna bay was noted, indicating that it had been in service on the supporting structure. (See Exhibit #6)

I then asked Ms. Smith about the location of the transmitters for radio stations KTSH and KAZC. She informed me that there was only one transmitter, and offered to show it to me. I accepted her offer, and she led me to a fenced area within the building that contained a Collins 830 Broadcast FM transmitter. (See Exhibit #7)

I asked Ms. Smith if this was, in fact, the transmitter for radio station KTSH. She informed me that the transmitter had been in service for radio station KTSH until the time that KAZC went on the air. She stated that Randy Mullinax, the chief engineer, had "changed" the transmitter to run station KAZC so it could go on the air. She also said that there were approximately 24 hours between the time that KTSH was taken off the air, and KAZC began broadcasting.

I then asked Ms. Smith if there was ever a time when both radio stations were on the air simultaneously. She again informed me that radio station KTSH went off the air approximately 24 hours before radio station KAZC went on the

Nolan Broadcast Services

air, and that Randy Mullinax had told her that station KTSH had antenna damage.

I then walked outside the studio building with Ms. Smith and took photographs of the base of the supporting structure, and the KTSH and KAZC antennas. (See Exhibits #8 and #9)

Upon leaving the KTSH/KAZC transmitter site, I drove to the KTSH construction permit site. There was no existing tower, and no activity at the KTSH permit site that would indicate the construction of a broadcast facility in progress. (See Exhibit #10)

Conclusion

Licensed station KTSH (FM) is not on the air, and has no transmission line connected to its antenna. One bay of the 6-bay Jampro antenna has been removed from the tower, and is stored on top of the main studio room's ceiling area. There is no damage of any kind apparent to this antenna bay. The antenna bay has been carefully stored with covers attached to both ends to prevent contamination from dust or moisture. According to Ms. Smith, this antenna element has been in storage for approximately 30 days. There does not appear to have been any attempt to repair any alleged damage to the single bay of the antenna.

There is only one FM transmitter at the site location for radio stations KTSH and KAZC. This Collins 830 transmitter served radio station KTSH since the station commenced operation. Station KTSH was taken off the air, and its transmitter was retuned by station engineer Randy Mullinax to allow station KAZC to begin operation under program test authority on Channel 202A. Radio stations KTSH and KAZC have never been on the air simultaneously. It would not be possible to return station KTSH to the air without the installation of a new transmitter. Furthermore, it would be necessary to install notch filtering in the antenna systems of both radio stations to accomplish simultaneous operation. Failure to install proper notch filtering for both radio stations would result in unsatisfactory interference to both facilities, and possibly generate mixing products in the FM band.

There is only one transmission line on the supporting structure for the use of stations KTSH and KAZC. This transmission line is currently serving radio station KAZC. This line was disconnected from the KTSH antenna, and reconnected to the KAZC antenna. It is not possible to return station KTSH to the air without the installation of a new transmission line.

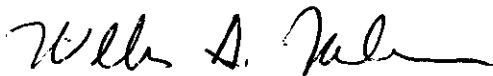
Nolan Broadcast Services

Station KAZC (CP) is operating under program test authority at a height above average terrain at least 9 meters below the value stated in the KAZC construction permit³, and FCC Form 302-FM. Furthermore, the antenna has been installed incorrectly resulting in approximately three degrees of positive beam tilt, which was not specified in the construction permit, or FCC Form 302-FM.

In my professional opinion, there is no damage to the KTSH antenna. Station KTSH was operating normally until the station was taken off the air in order to utilize its transmitter and transmission line for station KAZC. The lowest bay was simply removed to allow for the mounting of the KAZC antenna. Since the KTSH transmission line was utilized for the KAZC antenna, the integrity of this transmission line is unquestionable. If the lowest bay of the KTSH antenna was damaged severely by arcing, it is reasonable to assume that the fitting on the transmission line would have also been damaged by the introduction of contaminants such as carbon, which are a typical byproduct of severe antenna damage.

The design of the Jampro antenna used by station KTSH permits any bay or bays to be used individually as an emergency antenna.

Respectfully Submitted,



William H. Nolan
Broadcast Technical Consultant

³ FCC File No. BPED-970127MD

Nolan Broadcast Services



Exhibit #1 – FCC Tower Registration Sign at Gate



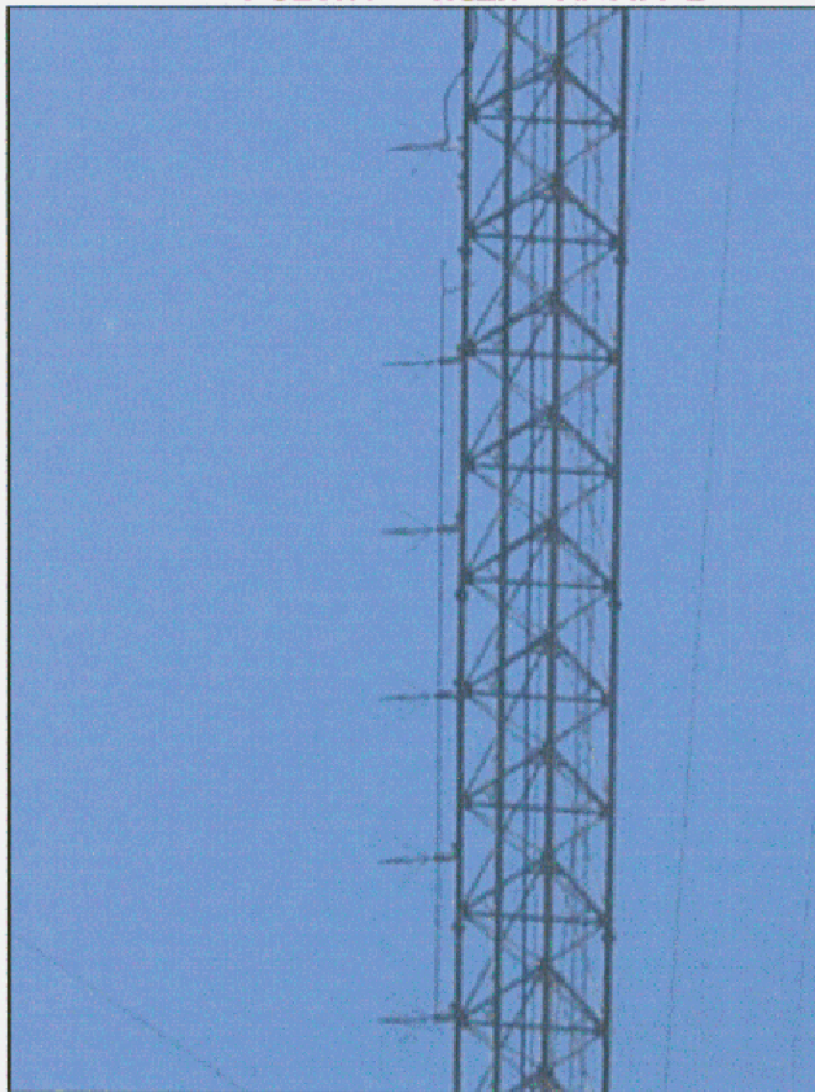
Exhibit #2 – KTSH/KAZC Main Gate at Highway

Nolan Broadcast Services



Exhibit #3 – KTSH/KAZC Tower Site

Exhibit #4 – KTSH and KAZC Antennas



Nolan Broadcast Services



Exhibit #5 – KTSH/KAZC Studio

Nolan Broadcast Services



Exhibit #6 – KTSH Jampro Antenna Bay Removed from Tower

Nolan Broadcast Services

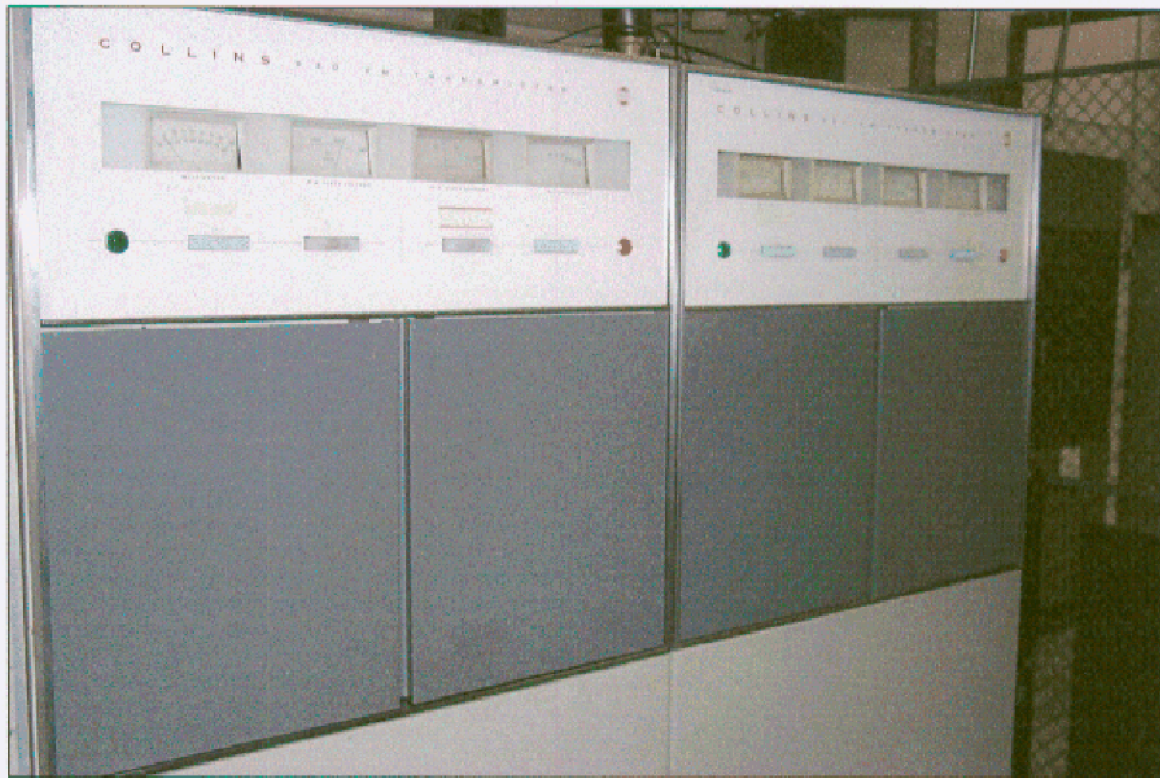


Exhibit #7 – KTSH/KAZC Transmitter

Nolan Broadcast Services



Exhibit #8 – Base of Supporting Structure for KTSH/KAZC

Nolan Broadcast Services



Exhibit #9 – KTSH/KAZC Antennas

Nolan Broadcast Services



Exhibit #10 – KTSH Construction Permit Site Location

ATTACHMENT D

Declarations of Ralph Tyler and Randall Mullinax

DECLARATION OF RALPH TYLER

I, Ralph Tyler, declare under penalty of perjury that to the best of my knowledge and belief the following information is true and correct.

I am the owner of KTSH (FM) Tishomingo, Oklahoma. I am the party responsible for the actions of my employees and I am fully prepared to bear the consequences of their actions.

I have known Randall "Randy" C. Mullinax for over twenty years. Over the years I have come to rely on his good judgment and technical expertise. In 1976 I hired him to be chief engineer of a station I owned at the time. Randy Mullinax was the chief engineer of the station during the approximately eleven years that I held a majority interest in that station. After I sold my interest in the station I continued to have contact with Randy Mullinax through a radio tower business I own. If there were any technical problems concerning placement of antennas or potential interference I would refer them to Randy Mullinax. In February 1998 Randy Mullinax was hired by Tyler Media Group, a company owned by my sons. Through Tyler Media Group, I have contracted for Randy Mullinax's engineering services for KTSH (FM).

I am seeking FCC approval to relocate KTSH from Tishomingo to Tuttle, Oklahoma. Before KTSH can be moved to Tuttle at least one other station had to be licensed to Tishomingo, Oklahoma. There was an FCC rule making comment deadline approaching on October 19, 1998, and I felt the best way to answer certain questions posed by the FCC in the rule making proceeding was to assist noncommercial educational station KAZC to get on the air by donating the KTSH transmitter, transmission line, and studio equipment and the engineering services necessary to complete the KAZC installation. It had always been my intent to donate this equipment to KAZC, but because of the FCC deadline I decided to do it sooner than I had planned.

On October 1, 1998, Randy Mullinax presented me with a letter for my signature notifying the FCC that KTSH was off the air. I signed the letter without discussing it with him. On October 29, 1998, an FCC inspector visited KTSH's studio and transmission facility. During his inspection of the facility, the FCC inspector called me. The questions the FCC inspector was asking were technical in nature and I did not possess the expertise to be able to answer them. I asked Randy Mullinax to join the conversation. Randy Mullinax and the FCC inspector then spoke about the technical facilities of KTSH. I believed Randy Mullinax was answering the FCC inspector's questions truthfully and accurately. After the conversation was completed, Randy Mullinax advised me that he had misled the FCC inspector. I called my communications attorney and advised him of what had just happened.

I did not know that misstatements were made until after the conversation with the FCC inspector. My office is approximately 100 miles from Tishomingo and I did not personally supervise the engineering work done at KTSH. In making this declaration I am in no way seeking to deflect responsibility for what happened. KTSH is my station and I am the party ultimately responsible for its operation. I should have paid more attention to what was written in

the October 1, 1998 letter. I should have been better informed as to the technical state of the KTSH facility. Had I done a better job I could have prevented this problem.

Executed this 17th day of December, 1998.



Ralph Tyler

DECLARATION OF RANDALL C. MULLINAX

I, Randall C. Mullinax, declare under penalty of perjury that to the best of my knowledge and belief the following information is true and correct.

Since 1969 I have been employed as an engineer at various radio and television stations and at Sprint PCS. In February 1998, I was hired by Tyler Media Group, Inc. as its director of engineering. Tyler Media Group has an agreement with Ralph Tyler pursuant to which I provide engineering services for Ralph Tyler's radio station, KTSH (FM), Tishomingo, Oklahoma.

Ralph Tyler wants to relocate KTSH (FM) from Tishomingo to Tuttle, Oklahoma. As I understand it, before KTSH (FM) could be moved to Tuttle, noncommercial educational station KAZC had to go on the air in Tishomingo. I also understand that it had always been Ralph Tyler's plan to donate the KTSH transmission line, transmitter and studio equipment to KAZC and to provide the engineering services necessary to complete the KAZC installation. Because of the FCC deadline this was being done sooner than originally planned.

In late September, 1998, the bottom bay of the KTSH antenna was removed and the KAZC antenna installed. The KAZC antenna was mounted at the KTSH location because at that time there was no tower lease agreement in place to permit KAZC to mount its antenna. This now has been rectified and the KAZC antenna has been mounted as specified in KAZC's construction permit.

I retuned the KTSH transmitter to KAZC's frequency and supervised the antenna crew that installed the KAZC antenna. On October 1, 1998 I drafted a letter for Ralph Tyler's signature advising the FCC that KTSH was off the air. Because one bay of the KTSH antenna was down and the antenna was not working to specifications, I wrote that KTSH was off the air due to antenna failure. I presented the letter to Ralph Tyler without discussing it with him.


On October 29, 1998, an FCC inspector visited the KTSH studio and transmitting facility. The FCC inspector called Ralph Tyler who asked me to participate in the telephone call. The FCC inspector wanted to know why KTSH was off the air. I told the FCC inspector that the bullet in the lower bay had failed and that as a result, I had called in a tower crew. I also told him that I had purchased a new bullet from a local surplus electronics dealer. The FCC inspector asked for the name and telephone number of the tower crew and the electronics dealer, which I provided.

After the telephone call with the FCC inspector, I called the tower company and the electronics dealer and asked them to verify what I had told the FCC inspector.

When the FCC inspector called I should have advised him of the true situation. Instead I panicked and perpetuated a false statement. I further compounded my mistake by calling the tower crew and the electronics dealer and asking them to verify a story I knew not to be true. I have been employed in the broadcast industry as an engineer for almost thirty years. I have

always been a good and conscientious employee and have never had any trouble with the FCC. In this one instance I failed to exercise the good judgement that has served me well during my career. I made a mistake that will never be repeated.

Executed this 10 day of December, 1998


Randall C. Mullinax

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2002, a copy of the foregoing
“Application for Review” was hand-delivered or sent by first-class mail, postage prepaid, to the
following:

The Honorable Michael Powell*
Chairman
Federal Communications Commission
The Portals II, Room 8-B201
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Kathleen Abernathy*
Commissioner
Federal Communications Commission
The Portals II, Room 8-A204
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Michael Copps*
Commissioner
Federal Communications Commission
The Portals II, Room 8-A302
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Kevin Martin*
Commissioner
Federal Communications Commission
The Portals II, Room 8-C302
445 Twelfth Street, S.W.
Washington, DC 20554

Peter H. Doyle, Chief*
Audio Division
Media Bureau
Federal Communications Commission
Room 2-A267
The Portals II
445 Twelfth Street, S.W.
Washington, DC 20554

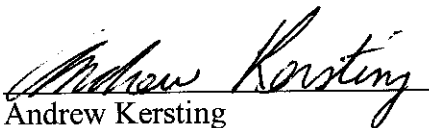
John A. Karousos*
Assistant Chief, Audio Division
Media Bureau
Federal Communications Commission
The Portals II, Room 3-A266
445 Twelfth Street, S.W.
Washington, DC 20554

Robert Hayne*
Audio Division
Media Bureau
Federal Communications Commission
The Portals II, Room 3-A262
445 Twelfth Street, S.W.
Washington, DC 20554

Gary S. Smithwick, Esquire
Arthur V. Belendiuk, Esquire
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, DC 20016
(Counsel for Ralph Tyler)

Bryan Billings, Esquire
Billings & Billings
1114 Hillcrest
Woodward, OK 73861
(Counsel for Classic Communications, Inc.)

Kathryn R. Schmeltzer, Esquire
Shaw Pittman
2300 N Street, N.W.
Washington, DC 20037-1128
(Counsel for FM 92 Broadcasters, Inc.)


Andrew Kersting

* Hand Delivered